UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION IX
75 Hawthorne Street
San Francisco, Ca. 94105

October 2, 1991
Mr. Ed Cassidy
Deputy Assistant Secretary -
Policy, Management and Budget
United States Department of the Interior
Office of the Secretary
Washington, D.C. 20240

Return Receipt Requested
P12 584502

Dear Mr. Cassidy:

Thank you for your recent letter concerning the Bluewater Uranium Mining sites located near Prewitt, New Mexico. The United States Environmental Protection Agency appreciates the concern which the Department of the Interior has expressed regarding the safety and health of Navajo families and other individuals who live in the vicinity of the Brown-Vandever-Nanabah and Navajo-Desiderio mining sites. As you are aware, the mines in question are located on allotted lands which are held in trust by the Department's Bureau of Indian Affairs (BIA).

As I indicated in my July 15, 1991 correspondence to Assistant Secretary Designate John Schrote, EPA has determined that releases and threatened releases of hazardous substances from the uranium mine pit surfaces, overburden, and abandoned ore debris and tailings at the Bluewater sites present an imminent and substantial endangerment to public health, welfare, and the environment. Given the serious potential health hazards associated with the release of hazardous substances at the sites, and the possibility that the resolution of this case may establish a precedent for the cleanup of similar sites, I believe that it is essential for EPA to respond to several of the statements contained in your letter.

As a preliminary matter, I want to reiterate that EPA Region IX has sought, and will continue to seek, a cooperative and constructive working relationship with DOI regarding environmental problems which may arise on Indian lands subject to our jurisdiction. It is my sincere hope that through these cooperative efforts, our agencies will be able to work through the complex legal and technical issues which might otherwise divide us, in order to further our common goal: the protection of human health in Indian country.

In this case, the Region IX Emergency Response Section (ERS) began an ongoing dialog with local and regional BIA and DOI representatives in late 1990, in order to ensure close coordination

between our agencies regarding the response actions to be undertaken at the Bluewater sites. Until recently, we had every reason to believe that Region IX had established a productive and cooperative working relationship with DOI. For several months this spring, my staff worked with BIA and DOI representatives in an effort to develop an Interagency Agreement (IAG) for the removal work at the sites. Pursuant to the terms of this IAG, Region IX was to conduct the removal activities at the sites in accordance with the technical criteria set forth in the EPA Action Memorandum, and DOI was to reimburse EPA for specified costs of the removal, pursuant to its authority under the Snyder Act, 25 U.S.C. Section 13.

In drafting the IAG, Region IX was well aware of DOI's sensitivity concerning the possible precedent which the Agreement might establish for the remediation of other BIA-administered mining sites. In light of this concern, our office crafted site-specific IAG language, to minimize the implication of BIA liability for site remediation under CERCLA. While the proposed IAG still referred to CERCLA (as the statutory basis for EPA's response activity at the sites), it also specifically referenced the Snyder Act (as the authority supporting BIA reimbursement of EPA's site response costs). Furthermore, the IAG itself stated that BIA's agreement to pay EPA for certain costs of the removal would in no way constitute an admission of liability under the Act. Finally, a special condition to the IAG clearly indicated that the Agreement was not to be viewed as a precedent for the payment of EPA's response costs at other sites in Indian country.

Since the time of our first contact with the Department, it has been Region IX's understanding that DOI representatives in Washington, D.C., including Mary Josie Smith of the DOI Office of Environmental Affairs, have been generally apprised of the development of the IAG, and have received copies of relevant correspondence concerning this cooperative effort. Based on this understanding, Region IX sent the proposed agreement to Mr. Schrote for signature on July 15, 1991.

Thereafter, in late July, Region IX received approval from EPA Headquarters on the Action Memorandum for the removal. This approval authorized the Region (for the first time) to move forward with the proposed response activities at the sites. Given the imminent and substantial endangerment which the sites pose to human health and the environment, Region IX determined that it needed to take prompt action to initiate the removal activities at the sites.

Prompt action on the part of EPA was also deemed to be critical in light of serious concerns which the Navajo Nation had raised regarding the eight month delay between the issuance of the ATSDR Health Advisory and EPA's approval of the Action Memorandum for the sites. As you know, during these months EPA conducted the preliminary assessment for the sites, and was required to spend a considerable amount of time reviewing and

analyzing the sampling data. A thorough review of the data was especially important in light of the unique nature of the releases at the sites.

In addition, EPA determined that it needed to begin work on the allotted portion of the sites by early-to-mid August, in order to avoid inclement weather in the autumn months, and to coordinate its response activities with the removal work to be conducted on other portions of the Bluewater sites. Accordingly, in late July, EPA informed the Department of its need to finalize the IAG promptly, in order to move forward with the proposed removal action.

However, in a conference call on August 1, 1991, DOI representatives George Farris, Mary Josie Smith, and Michael Mason informed Region IX that, contrary to previous indications from local and regional DOI officials, the Department would not agree to participate as a signatory to the IAG. Since DOI believed that the the Agreement might be viewed by other parties as a precedent for future response actions, the Department instead proposed that it be allowed to perform the planned removal activities on the allotted portion of the sites.

In response to DOI's concern, EPA first offered to revise the IAG, to incorporate any new language that the Department might suggest. However, DOI responded that it was the very concept of the IAG, rather than its specific language, that was objectionable to the Department. EPA then indicated that it would consider the Department's proposal to perform the removal work itself. However, the Region concluded the August 1 conference call by stressing the need for prompt action at the sites.

After considering DOI's proposal, EPA indicated that it would be open to having DOI step into EPA's shoes to conduct the removal action on the allotted portion of the sites. However, since EPA had planned to mobilize its contractor for the work during the early part of the following week (August 5-9), Region IX stated unequivocally that if DOI wanted to perform the removal work, it would need to make a firm commitment to do so by Monday, August 5. Furthermore, EPA indicated that DOI would need to begin work at the sites on, or shortly after, August 12 (as EPA had planned to do), so that this change would not result in further delay and endangerment of the local population. Finally, Region IX stated emphatically that if DOI could not provide the required assurance to conduct the removal action by August 5, EPA would proceed with its previous plan to conduct the response activities on the allotted lands.

Although DOI representatives agreed to contact Region IX by Monday, August 5, to inform EPA of the Department's final decision on whether it would conduct the removal work at the sites, the August 5 deadline passed without any additional communication between the Department and EPA. Furthermore, when EPA representative Don White finally spoke with Mary Josie Smith of DOI on August 6, he still did not receive a firm commitment from the Department to promptly initiate work at the sites. Instead, Ms.

Smith informed Mr. White that due to budget constraints, DOI would need to obtain funding approval from Congress in the form of a line item budget increase before it could commit to perform the work in question. Ms. Smith estimated that DOI could probably obtain such funding approval within one to two weeks.

I have included the above discussion, setting forth the facts of this case in detail, because your letter states that as of August 7, 1991, DOI was "willing to expeditiously initiate cleanup activities" at the two allotted sites in lieu of reimbursing EPA for response costs under the proposed IAG. While this statement may truly reflect DOI's willingness to perform the work in question, the fact remains that the Department was simply not able to make a firm commitment to conduct the removal work within the timeframe required by EPA.

As indicated above, EPA had ample reasons for setting a firm August 5 deadline for DOI's response. Despite the Department's "willingness" to participate in the planned removal, and Ms. Smith's August 6 prediction of imminent funding for the activities in question, EPA simply had no assurance during the critical week of August 5-9 that DOI would be able to initiate the proposed response action within one week, one month, or six months from that time. Thus, given the serious health hazards which the sites continued to pose to nearby Navajo residents, and the need for prompt action to abate those hazards, EPA had no real choice but to proceed on schedule with the proposed removal activities, rather than waiting for an unknown period for the Department to obtain funding approval.

Moreover, it should be noted that the scope of the cleanup activities that DOI was willing to perform at the sites appears to have narrowed considerably between the time of the last negotiations between DOI and Region IX and the date of your correspondence. DOI representatives had previously informed EPA that the Department would perform all of the response activities which were outlined in the EPA Action Memorandum for the sites. However, your August 7, 1991 letter implies that DOI was only willing to perform those cleanup activities which were related to the physical hazards present at the sites (such as open mine shafts and surface mine pits).

As stated above, EPA's primary goal in conducting the response activities at the Bluewater sites is to prevent and abate the release of hazardous substances, including radionuclides, which may present an imminent and substantial endangerment to public health, welfare, and the environment. Accordingly, EPA would not have supported any efforts by the Department to conduct response activities at the sites unless DOI had agreed, upfront, to perform all of the removal actions specified in the EPA Action Memorandum, in order to abate the ongoing release of hazardous substances at the sites.

While the result in this case was unfortunate in terms of EPA and DOI coordination, under the facts presented, it was essential for EPA to take decisive action during the week in ques-

tion, in order for Region IX to be able to initiate the response activities in a timely fashion. I am hopeful that such problems can be avoided in the future, if we work together and try to bring all the necessary parties into the decision-making process as early as possible.

Finally, with regard to the issue of BIA's potential liability at the sites, your letter implies that the Department of Justice (DOJ) fully supports DOI's legal position, that BIA is not liable as an "owner" or "operator" under CERCLA as a result of its status as a Federal trustee for Indian lands, or because of its role in approving leases on trust and allotted lands. To EPA's knowledge, however, the United States has not taken a formal position on this issue in litigation or administrative proceedings held to date, nor has a court issued a dispositive ruling on this matter.

Moreover, you should be aware that neither EPA nor the Department of Justice has ruled out the possibility that BIA may be found to be responsible for the payment of site response costs in appropriate cases. In this regard, where the available facts indicate that BIA may have exercised oversight or control over a CERCLA site, beyond mere lease approval, we believe that a thorough investigation of the underlying circumstances is warranted, to determine whether the Department bears any responsibility for the remediation of the site.

In this case, Region IX has obtained documents which suggest that BIA may have been responsible for assuring that the allotted lands in question were adequately reclaimed following the cessation of mining operations at the sites. At the present time, EPA is continuing its examination of the evidence regarding BIA's role in the mining and reclamation operations conducted at the Bluewater sites. We will be coordinating with the Department of Justice as is necessary to resolve these concerns.

As indicated above, EPA Region IX hopes to move forward to establish a cooperative and constructive relationship with the Department of the Interior regarding environmental problems which may arise on Indian lands. If you have any further suggestions regarding the proposed IAG, or the implementation of the response activities at the sites, please contact me immediately. Even at this late date, EPA would be happy to discuss these issues in order to reach a mutually agreeable solution. Finally, if you have any questions or concerns regarding this matter, please do not hesitate to call me at FTS 484-1730.

Sincerely,

Jeff Zelikson, Director
Hazardous Waste Management Division

cc: George Farris, BIA
Mary Josie Smith, DOI
Bill Allen, DOI
Ray Churan, DOI
David Coursen, EPA
Martin Topper, EPA
David Lopez, EPA

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